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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-911

ADAMO WRECKING CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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STATEMENT.

The Government's brief is laced with assertions of facts outside the record, but reply to most is unnecessary. Petitioner is, however, constrained to point out that its challenge to the sufficiency of the indictment was raised, even before pleading, as a question of law. There was no presentation to, or resolution by the trial court of questions of fact. It was for this reason, not as a concession, that Petitioner did not contest below the adequacy and effectiveness of the statutory review afforded by Section 307(b)(1) of the Clean Air Act.

The Government's brief repeatedly asserts, as if it were a matter of undisputed fact, that the statutory remedy is adequate and effective. The record, however, does not support the Government's notion that EPA publications in the fine print of

the Federal Register, and the additional publicity, if any, associated with its public hearing procedures, resulted in actual notice to Petitioner and other demolition contractors within the 30 days provided for seeking statutory review of EPA's final regulation. Nor does the record suggest that Petitioner had any reason to search for an EPA regulation which might adversely affect it.

Since the adequacy and effectiveness of the statutory remedy against unlawful EPA action was not litigated below and is neither shown by the record nor conceded, Petitioner believes it is appropriate to assume that fact, but only *arguendo*. The argument which follows is presented on that limited assumption.

ARGUMENT.

The indictment (App. 1)[1] alleges that Petitioner demolished a building by a work practice other than the one mandated by an EPA regulation, and charges violation of Section 112 (c)(1)(B) of the Clean Air Act, as amended, 42 U. S. C. § 1857c-7(c)(1)(B).[2] Although the Government seeks an adjudication that Petitioner is a criminal for having violated this section of the Act, its brief completely ignores the section's provisions.

Section 112(c)(1)(B) prohibits violation of an "emission standard." The trial court held (Pet. App. A35-A44) that a work practice rule, such as EPA had promulgated, is not the same thing as an emission standard. He therefore found the indictment deficient, because violation of an "emission standard" is an explicit essential element of the offense.

1. For convenience, the term "indictment" denotes Count I of the superseding indictment, since neither Count II of that indictment nor any count of the original indictment are before the Court on this appeal.

2. A knowing violation of Section 112(c) is made criminal by Section 113(c)(1)(C) of the Act, 42 U. S. C. § 1857c-8(c)(1)(C).

Petitioner's opening brief demonstrates that the trial court was absolutely right to view an emission standard and a work practice rule as being two different things. Petitioner would now invite the Court's attention to the Government's Supplemental Memorandum advising of and commenting upon recent amendments to Section 112. Even the Government now admits (Supp. Memo. p. 4, n. 2), in so many words, that the recent amendments make it clear that work practices and emission standards are "distinct methods of regulation."

The parties are thus in complete agreement that an emission standard and a work practice are two distinct and different things. How then can it be said that Petitioner committed the crime of violating an "emission standard" by allegedly failing to follow a work practice?

There is no need to seek a further Court of Appeals opinion, as the Government seems to suggest at page 27 of its brief. The record is adequate to enable this Court to decide whether the indictment is legally sufficient. It should, therefore, decide that question in the interest of judicial economy. See, *Perkins* v. *Matthews*, 400 U. S. 379, 386-7 (1971).

The Government does not deny and cannot deny the trial court's jurisdiction to decide whether the indictment alleged the essential elements of the crime, and that is all the trial court did. In fact, he carefully refrained from holding the work practice rule invalid, noting that it ". . . may be duly authorized, but it is not [an emission] standard" (Pet. App. A41, n. 40). No case cited by the Government, and none of which Petitioner is aware holds that a withdrawal provision such as Section 307(b)(2), 42 U. S. C. § 1857h-5(b)(2), precludes a trial court from examining an administrative regulation on its face to ascertain whether it is the kind of regulation specified in a criminal statute. The Court of Appeals' decision amounts to a holding that the trial court was required to make Petitioner a

criminal for engaging in conduct which Congress did not make a crime. That decision is wrong, and should be reversed.

Furthermore, the Court of Appeals was wrong and the trial court was right, even if the trial court's ruling should be viewed as a form of judicial review. Section 307 of the Clean Air Act does not mean, and cannot mean, that the Environmental Protection Agency, by invoking the authority of Section 112, can order the citizens of this country to do *anything* it pleases on pain of criminal conviction, provided only that no one contests within 30 days.

As shown in Petitioner's opening brief, *Leedom* v. *Kyne*, 358 U. S. 184, 188 (1958), supports the proposition that the term "judicial review" in Section 307(b)(2) should be construed to mean judicial review of agency action which is at least facially within the scope of agency authority. Even the cases cited by the Government in its grudging discussion of *Leedom* recognize the continued vitality of its holding.

Manges v. *Camp*, 474 F. 2d 97, 99 (5th Cir. 1973), was completely ignored by the Court of Appeals, just as it is now completely ignored by the Government. However, it is squarely in point here. There the court held that a preclusive provision indistinguishable from Section 307(b)(2) did not foreclose a belated, "wrong court" attack upon a facially lawless agency order. Indeed, the only difference between *Manges* and this case is that here the trial court was called upon for affirmative criminal enforcement of the facially unauthorized agency order.

Hence, on the authority of both *Leedom* and *Manges*, the trial court's examination of the regulation was not precluded by Section 307(b)(2) of the Act.

To paraphrase the conclusion of note 4 of the Government's Supplemental Memorandum, prior to the recent amendment nothing in the legislative history of the Act suggested a Congressional belief that EPA was authorized by Section 112 to promulgate work practices instead of emission standards. The Government seems to suggest, at pages 26 to 32 of its brief, that

it was wise and beneficent for EPA to adopt the expedient of usurping authority to promulgate a work practice rule, instead of the emission standard Section 112 required, until such time as it could persuade Congress to amend the Act. If ours were a government of men, this position might have some merit. However, ours is a government of law, so the Government's position is unsound on its face.

CONCLUSION.

For each and all of the foregoing reasons, and those set forth in Petitioner's opening brief, the Court of Appeals' decision should be reversed, and the cause should be remanded with directions to reinstate and affirm the trial court's judgment.

Respectfully submitted,

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